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AUG 04 2005

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:

Chris A. Barton et al.

Application No. 09/916,929

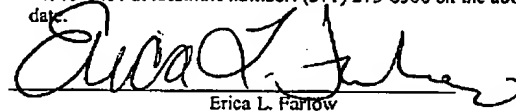
Filed: July 26, 2001

For: ANTI-VIRUS SCANNING CO-PROCESSOR

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) Group Art Unit: 2137
)
) Examiner: Schubert, Kevin.
)
) Date: August 4, 2005
)
)CERTIFICATE OF FACSIMILE

I hereby certify that this correspondence is being facsimile transmitted to the Commissioner for Patents, Alexandria, VA 22313-1450 at facsimile number: (571) 273-8300 on the above date.

Signed:


Erica L. Farrow

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

**37 CFR 1.181 PETITION FOR CONSIDERATION OF 37 CFR 1.131
AFFIDAVIT AFTER FINAL**

Sir:

In response to the Office Action mailed March 22, 2005 and the Advisory Action mailed July 06, 2005, and in furtherance of Amendment B mailed June 22, 2005, applicant hereby petitions for the consideration of the affidavit and accompanying evidence submitted with Amendment B.

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Statement of Facts - 37 CFR 1.181(a)

In the Advisory Action mailed July 06, 2005 (see Exhibit A), the Examiner argues that an affidavit (see Exhibit B) submitted with Amendment B on June 22, 2005 fails to overcome the 102(e) rejection under Grupe because the affidavit has not been seasonably presented.

However, affidavits submitted under 37 CFR 1.131 and other evidence traversing rejections are considered timely if submitted ... after final rejection and submitted ... with a first reply after final rejection for the purpose of overcoming a new ground of rejection or requirement made in the final rejection. See MPEP 709.15

In the present application, prior to final, the Examiner issued a first Office Action on January 13, 2005 (see Exhibit C) rejecting Claims 1-2, 4-14, 17-18, 20-30, and 33 under 35 U.S.C. 102(e) as being anticipated by Makita, U.S. Patent Application Publication No.: 2001/0007120. Thereafter, under final, the Examiner issued a final Office Action on March 22, 2005 (see Exhibit D) rejecting Claims 1-2, 4-7, 9-13, 17-18, 20-23, 25-29, 33-35, 38-40, 42 and 44 under 35 U.S.C. 102(e) as being anticipated by Grupe (U.S. Patent Application Publication No. 2002/0194212).

Thus, it is clear that the Examiner had issued a new ground of rejection or requirement in the final rejection (the new reliance on Grupe), and applicant's submission of the 37 CFR 1.131 affidavit, under final, was for the purpose of overcoming such new ground of rejection or requirement. Applicant therefore asserts that the 37 CFR 1.131 affidavit should have been considered.

Review of an examiner's refusal to enter an affidavit as untimely is by petition and not by appeal to the Board of Patent Appeals and Interferences. *In re Deters*, 515 F.2d 1152, 185 USPQ 644 (CCPA 1975); *Ex parte Hale*, 49 USPQ 209 (Bd. App. 1941). Thus, applicant hereby petitions for the consideration of the affidavit and accompanying evidence submitted with Amendment B.

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Request for Reconsideration - 37 CFR 1.181(b)


Request for reconsideration has been submitted herewith (see Exhibit E). However, in order to meet the 2-month deadline under 37 CFR 1.181(f), the present petition is filed coincidentally with the request for reconsideration.

Petition Fee - 37 CFR 1.181(d)

The Commissioner is authorized to charge any fees or credit any overpayment to Deposit Account No. 50-1351 (Order No. NAI1P014).

In the event a telephone conversation would expedite the prosecution of this application, the Examiner may reach the undersigned at (408) 505-5100.

Respectfully submitted,
Zilka-Kotab, PC



Kevin J. Zilka
Registration No. 41,429

P.O. Box 721120
San Jose, CA 95172-1120
408-505-5100